Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

CITY OF MOUNT VERNON and JAMES GLEASON, Individually and as Commissioner of the Fire Department of the City of Mount Vernon, New York,

Petitioners,

vs.

MATTHEW T. STONE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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67 pp.

QUESTIONS PRESENTED

1. Does the Americans with Disabilities Act ("ADA") require a municipal fire department to employ as a firefighter a person who suffers from paraplegia and admittedly cannot fight fires even with reasonable accommodation?

2. Does the ADA preclude a municipal fire department from requiring that all its firefighters be capable of responding to fires and other emergencies simply because those emergencies occur infrequently?

LIST OF PARTIES

The petitioners are the City of Mount Vernon, New York (the "City"); James Gleason, as Fire Commissioner of the City of Mount Vernon, New York; and James Gleason in his individual capacity. The petitioners were defendants in the District Court and appellees in the Court of Appeals.

The respondent, Matthew T. Stone, was the plaintiff in the District Court and the appellant in the Court of Appeals.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 118 F.3d 92 and is reprinted as Appendix A to this Petition.

The opinion of the United States District Court for the Southern District of New York (Brieant, U.S.D.J.) has not been reported. It is reprinted as Appendix B to this Petition.[1]

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit is dated June 30, 1997. The order from the Second Circuit denying the petition for a rehearing *in banc* is dated October 22, 1997 and the mandate issued by that court is dated November 7, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, provides in pertinent part as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(42 U.S.C. § 12112(a)).

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1. Rather than issuing a written opinion, Judge Brieant directed that the transcript of an oral argument serve as his opinion (p. 33a, *infra*).

The ADA defines "qualified individual with a disability" as follows:

> An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, the description shall be considered evidence of the essential functions of the job.

(42 U.S.C. § 12111(8)).

2. Section 504 of the Federal Rehabilitation Act, as amended, 29 U.S.C. § 701 *et seq.*, provides in relevant part:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> * * *
>
> The standards used to determine whether this section has been violated in a complaint alleging discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and the provisions of Section 501 through 504 and

> 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12201 - 12204 and 12210), as such sections relate to employment.

(29 U.S.C. § 794(a), (d)).

3. The Regulations adopted by the Equal Employment Opportunity Commission, 29 C.F.R. § 1630 *et seq.*, provide in relevant part as follows:

> *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(29 C.F.R. § 1630.2(m)).

The Regulations also identify several factors that should be considered when determining whether a particular task is an essential function of a position:

> (1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
>
> (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) The function may be essential because the reason the position exists is to perform the function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of the job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(29 C.F.R. § 1630.2(n)).

STATEMENT OF THE CASE

This case involves an issue of nationwide importance regarding the right of a municipal fire department to insist that all of its firefighters have the ability to fight fires and respond to other similar emergencies even if these functions are required infrequently.

Matthew Stone requested that the City of Mount Vernon Fire Department provide him with an active duty firefighting job. Mr. Stone suffers from paraplegia and is admittedly unable tc fight fires and respond to similar emergencies even with a reasonable accommodation. When the City refused to provide him with such a job, Mr. Stone sued under the ADA.

The District Court dismissed Mr. Stone's complaint, holding that the City had the right to consider firefighting to be an essential duty of a firefighter.

The United States Court of Appeals for the Second Circuit subsequently held that fighting fires is not necessarily an essential function of a firefighter's job and ordered the District Court to conduct a trial.

The City respectfully submits that the circuit court's holding misread the applicable law and directly conflicted with the correct holdings of two other circuit courts of appeals.

The facts are as follows. The City has a population of approximately 70,000 and is located in Westchester County, New York, adjacent to New York City. Its fire department consists of only 109 members, who must provide firefighting and emergency services twenty-four (24) hours a day, seven (7) days a week. Consequently, at any one time, there are only approximately twenty-eight (28) officers on duty.

Mr. Stone was hired by the City on January 23, 1990. He worked as an active firefighter from January 23, 1990 until December 18, 1992 when he fell from a tree while off duty and injured his spine. As a result of this injury, Mr. Stone suffers from paraplegia, a complete paralysis of his lower limbs. It is undisputed that Mr. Stone's condition prevents him from performing the duties he previously performed as an active firefighter, which included the following: rescuing persons from burning buildings; climbing ladders to enter burning buildings; manning fire hoses and directing water streams; and giving emergency first aid to injured persons.

Mr. Stone asked the City to continue employing him as a firefighter despite his admitted inability to perform the duties listed above, even with reasonable accommodation. Mr. Stone argued that he could perform the duties of a firefighter assigned to the Fire Prevention Bureau or Fire Alarm Bureau. The City regretfully declined on the ground that all of its firefighters must be available to fight fires.

A. The District Court's Opinion and Order

Mr. Stone commenced this action in United States District Court alleging that the City and Fire Commissioner Gleason violated the ADA, Section 504 of the Rehabilitation Act and the New York State Human Rights Law by failing to assign him to such duties because of his paraplegia. The City moved for summary judgment on the ground that Mr. Stone is admittedly unqualified to perform the essential function of the job, namely to fight fires, with or without reasonable accommodation. United States District Judge Charles L. Brieant granted the City's motion and dismissed the complaint.

The District Court rejected Mr. Stone's contention that firefighters in the City's Fire Alarm Bureau and Fire Prevention Bureau do not need to be available to fight fires:

> [T]he defendants contend and this Court concludes that the department's small size requires that all full-duty firefighters be capable of fighting fires, regardless of the bureau or task to which they may be temporarily assigned.
>
> * * *
>
> Every fire person is hired as a firefighter, and the fact that they also have other work does not detract from their obligation to perform the essential functions of a firefighter in this department of limited size, when and if there becomes a serious confrontation[2] in the City.
>
> Plaintiff, who alleges that he can only perform the specialized duties of persons assigned to the Fire Prevention Bureau and Fire Alarm Bureaus, has not shown to the satisfaction of this Court for purposes of this statute that he is capable of performing the essential functions of a firefighter.

(pages 36a-40a, *infra*).

The District Court did not rely upon stereotypical assumptions about the nature of a firefighter's job to reach its conclusion. Rather, the District Court relied upon the record established below, most particularly the affidavit of Fire Commissioner Gleason, to conclude as follows:

> . . . Mr. Stone's injury prevents him from performing the essential duties of a firefighter assigned to any

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2. Although the transcript reads "confrontation," the court probably said, or at least intended, "conflagration."

> bureau within the Fire Department. The needs of the department and the nature of the firefighter's work require every firefighter in the City of Mount Vernon to be capable of performing firefighting duties at the scene of a fire.

(page 38a, *infra*).

B. The Second Circuit's Opinion and Order

On appeal the United States Court of Appeals for the Second Circuit reversed the District Court's decision on the ground that fighting fires is not necessarily one of the essential duties of a firefighter. In reaching this holding the Second Circuit relied on the infrequency with which firefighters assigned to Fire Prevention Bureau are required to fight fires. (p. 20a, *infra*).[3]

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3. The Second Circuit also appears to assume that positions for firefighters exist in the City's Fire Alarm Bureau. This is not true. The record demonstrates without contradiction that the only firefighters (as opposed to civilian dispatchers who are hired from a separate civil service list) whom the City has ever assigned to the Fire Alarm Bureau for more than a few weeks at a time are those who were injured on the job and are entitled by virtue of N.Y. General Municipal Law § 207-a to full salary whether they are asked to work light duty or not (JA 270). It costs the City nothing to temporarily assign these § 207-a firefighters to the Fire Alarm Bureau, since the City would have to pay them the same salary even if they stayed at home and did nothing. Thus, there is no such thing as a regular Fire Alarm Bureau firefighter position that Mr. Stone could ever fill. The Fire Alarm Bureau is merely a place for the City to get some type of return for its § 207-a payments while firefighters are recovering from their on-the-job injuries. In contrast, Mr. Stone's injury was off the job, so the same considerations do not apply to his situation.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW MISCONSTRUES THE APPLICABLE LAW GOVERNING THE EMPLOYMENT OF DISABLED INDIVIDUALS FOR EMERGENCY RESPONSE POSITIONS.

The Rehabilitation Act proscribes discrimination by any federally funded program against an "otherwise qualified individual with a disability" (29 U.S.C. § 794(a)). This language parallels the ADA's prohibition of discrimination against a "qualified individual with a disability" (42 U.S.C. § 12132). Courts employ the same standards under both statutes to determine whether an individual is "qualified" and whether unlawful discrimination has occurred (*Champ v. Baltimore County*, 884 F. Supp. 991 (D. Md. 1995), *aff'd*, 91 F.3d 129 (4th Cir. 1996); *see also* 29 U.S.C. § 794(d) (Rehabilitation Act is to be interpreted in accordance with standards applied under the ADA)).

The ADA defines the term "qualified individual with a disability" as follows:

> [A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

(42 U.S.C. § 12111(8)).[4] In order to state a claim under the

4. This statute is part of Title I of the ADA. Title II of the ADA, the Title upon which this lawsuit is based, extends the anti-discrimination prohibition embodied in Section 504 of the Rehabilitation Act to all action (Cont'd)

ADA, it is not enough for a plaintiff to allege that he can perform some of the essential duties of the desired job. Rather, he must show that he can perform *all* of the essential duties of the job. This Court has held that a disability discrimination plaintiff must be "able to meet all of the program's requirements in spite of his handicap" (*Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979)). The ADA does not require employers to eviscerate jobs of their essential functions in order to hire disabled individuals (442 U.S. at 413-14, 99 S. Ct. at 2370-71); *see also* 29 C.F.R. § 1630.2(o), Appendix, *Interpretative Guidance to Part 1630*).

The Second Circuit based its decision on the premise that fighting fires may not be an "essential function" of a Mount Vernon firefighter because firefighters assigned to the Fire Prevention Bureau are rarely asked to fight fires. The Second Circuit wrongly equates "essentialness" with frequency. In most industries it would admittedly be difficult to argue that a duty is essential if it is performed very infrequently. In an emergency response agency, however, a duty can be essential to a job even when it is hardly ever needed. In fact, the very essence of the job for an employee providing emergency services is to be available for infrequent emergencies.

The Second Circuit's decision misconstrues the ADA as applied to emergency response positions. When the core function of a job is to be ready for emergencies that occur infrequently, it is illogical and legal error to hold that the infrequency of the emergencies makes that core function nonessential. The Second Circuit's rationale in this regard conflicts with the decisions of

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(Cont'd)
of state and local government and adopts § 504's employment standards, which, as discussed above, are identical to those under Title I of the ADA. 28 C.F.R. Pt. 35, App. A; *see also* 1992 Amendments to the Rehabilitation Act, 29 U.S.C. § 794(d).

two other United States Circuit Courts of Appeals that have considered this issue, as explained below at Section 2.

The Second Circuit's holding would lead to illogical results for many emergency response employers and potentially dangerous consequences for its citizens. A police department in a quiet suburb would be compelled to hire police officers who cannot, even with reasonable accommodation, accurately discharge a firearm, because many of the police officers in the department have not yet been required to do so in the course of their duties and a job could be found for them where they *probably* would never have to use their gun. An airline would be required to hire flight attendants who cannot function in an emergency landing simply because the vast majority of flight attendants would never be called upon to do so. The civil service test for firefighters would have to be altered to eliminate tests of the physical strength and endurance necessary to fight fires. Such results are contrary to the policy of the statute — the employment of disabled individuals who are qualified for the job. These examples show that when emergency response is part of an employee's job description, that duty can be "essential" within the meaning of the ADA even when it has never been required of any employee.

Such results are contrary to the Regulations promulgated by the EEOC. Those regulations make clear that frequency is only one of many factors to be taken into account when determining whether a duty is essential. (29 C.F.R. § 1630.2(n)(3)). Indeed, Section 1630.2(n) of the EEOC Regulations specifically lists four circumstances that make a job function essential, all of which are present in this proceeding and were overlooked by the Second Circuit:

> (i) The function may be considered essential because the reason the position exists is to perform the function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of the job function can be distributed and/or

(iii) The function may be highly specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function.

(iv) The consequences of not requiring the incumbent to perform the function.

As the District Court held, the job itself is fighting fires — that is the reason it exists. In a small fire department like Mount Vernon there are a limited number of firefighters available to fight fires twenty-four (24) hours a day, seven (7) days a week, whenever the emergency arises. The consequences of having a firefighter arrive at the scene of a fire without the ability to assist a crew at the scene can literally mean the difference between life or death to the public. The Second Circuit unreasonably elevated the frequency factor above all others, including those recognized by the EEOC. In doing so, it has given short shift to such factors as the employer's judgment, the reason that firefighters exist, the specialized duties for which firefighters are hired, the written job description[5] and the potentially

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5. The Second Circuit incorrectly states that the record contains no job descriptions with respect to the Fire Prevention Bureau (p. 20a, *infra*). In fact, the job description that applies to every firefighter is in the record. This job description supports the City's position that all firefighters, whatever their bureau assignment, must be able to fight fires, which necessarily includes putting up and climbing ladders, entering burning buildings and evacuating people from burning buildings. The Fire Prevention Bureau is not a separate job; it is an assignment given to some firefighters for a period of time.

disastrous consequences of not requiring all firefighters to be able to fight fires. 29 C.F.R. §§ 1630.2(n)(3)(i), (ii), (iv).

To the extent that the Second Circuit found that Fire Prevention Bureau firefighters *never* fight fires, it misread the record. Contrary to the decision below (p. 20a, *infra*), Fire Prevention Bureau firefighter John Koch did not testify that he had never fought fires. To the contrary, he testified that it is part of his job to be available to fight fires. He testified specifically that within the last several years he had entered a burning building, wearing an air pack to help fight a fire, and had manned a fire hose at a fire scene (JA 215, 223). Also, firefighters assigned to the Fire Prevention Bureau routinely act as guides for outside firefighters working in the City and are subject to firefighting duty during these times. Even if it were true that the City's Fire Prevention Bureau firefighters have not been asked to fight fires at all in recent years, the City would still have the right to expect firefighters assigned to the Fire Prevention Bureau to be available to fight fires in emergencies.

The Second Circuit mischaracterizes the City's argument as based on undue hardship, *i.e.*, that assigning Mr. Stone to the Fire Prevention Bureau would be an undue hardship on the Department. (p. 23a, *infra*). The City's brief below made it quite clear that its argument was based solely on whether Mr. Stone could perform all the essential duties of the job of firefighter, with or without reasonable accommodations. Because he cannot, and because fighting fires is a requirement of every assignment within the Department, there is no need to discuss whether granting Mr. Stone the position he wants would cause the petitioners an undue hardship. The ADA does not require an employer to accommodate disabled individuals by eliminating essential duties.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF TWO OTHER UNITED STATES CIRCUIT COURTS OF APPEALS.

The decision below conflicts with the decision of two other circuit courts of appeal concerning the same issue in the proceedings below — whether a duty must be performed frequently before it may be characterized as an "essential function" of a public safety position.

In *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997), the United States Court of Appeals for the Eleventh Circuit ruled that a municipality was not obligated under the ADA to continue to accommodate a visually impaired police detective who could not drive a car or collect certain kinds of evidence at crime scenes. Unlike the Second Circuit in the decision below, the Eleventh Circuit affirmed the District Court's grant of summary judgment to the employer and specifically rejected the argument that duties that are rarely performed are inherently nonessential:

> Although we do not doubt Holbrook's assertions concerning the relatively low crime rate in Alpharetta, nor do we dispute that a police department may be able to predict in general terms what types of evidence will need to be collected at a given crime scene, Holbrook has not shown — and, in our view, cannot show — what types of criminal investigations an Alpharetta police detective may be called upon to investigate in the future nor what evidence it may be necessary to collect at that time. The record indicates that it is not possible to anticipate, in every instance, precisely what evidence

> will need to be collected and what duties will need to be performed in any given investigation; more importantly, notwithstanding the historical record, we can speculate but not foretell with absolute certainty what crimes may be committed in the City of Alpharetta in the future. *Even assuming that an Alpharetta police detective spends a relatively small amount of time performing the type of field work that Holbrook concedes he cannot undertake, the record establishes — and Holbrook has not proven to the contrary — that the collection of all evidence at the scene of a crime is an essential function of being a police detective in the City of Alpharetta.*

112 F.3d at 1527 (emphasis added).

The Eleventh Circuit also rejected the argument in *Holbrook* that the employer could have continued to accommodate the plaintiff with a minor "reshuffling" of case assignments as it had in the past. The Eleventh Circuit noted that because the police department could not predict what crimes will be committed or what evidence will appear at a crime scene, if the unexpected happened and more than one crime occurred simultaneously, the accommodation proposed by plaintiff necessarily would require the reallocation of an essential part of his job because "being prepared to respond to unexpected events is, in part, precisely what defines a police officer or detective." 112 F.3d at 1528.

This exact logic applies with equal force to this case. Firefighter Koch, a firefighter assigned to the Fire Prevention Bureau in Mount Vernon, testified that it is his job to be available to fight fires and that he has on occasion been called to the scene of a fire and assisted the crew working the fire. Thus, to accommodate Mr. Stone's disability by assigning him to the Fire

Prevention Bureau, the City would necessarily have to ignore an essential part of that job — fighting fires — because Mr. Stone admittedly cannot perform that duty with or without a reasonable accommodation. The ADA does not require the City to jeopardize the lives of its citizens by eliminating a firefighter's responsibilities to perform life-saving functions.

Likewise, in *Champ v. Baltimore County*, 884 F. Supp. 991 (D. Md. 1995) *aff'd*, 91 F.3d 129 (4th Cir. 1996), the United States Circuit Court of Appeals for the Fourth Circuit affirmed without decision a District Court's grant of summary judgment to the defendant county because the plaintiff was unable to perform the essential functions of his job as a police officer — namely, making a forcible arrest and operating emergency vehicles. Plaintiff argued that because positions existed within the police department that did not require officers to make forcible arrests or operate emergency vehicles, these skills were nonessential and were thus immaterial to a determination of whether he was a qualified individual with a disability.

The Fourth Circuit affirmed the District Court's reliance on deposition testimony from the employer that officers in non-patrol positions were subject to reassignment "on a moment's notice" and thus were expected to be able to perform the full duties of a police officer, including making arrests and operating emergency vehicles. The District Court held, and the Fourth Circuit affirmed, that because the plaintiff could not perform these functions, with or without reasonable accommodation, he was not a qualified individual regardless of any other functions he might be able to perform:

> Although the identification of a job function as essential is a "factual determination," Champ has failed to provide any evidence that the ability to make a forceful [sic] arrest, drive a vehicle under

> emergency circumstances, or qualify with a weapon are not in fact essential duties of all police officers positions with the Baltimore County Police Department. He offers no testimony to refute defendants' assertion that officers in non-patrol positions are subject to reassignment at any time, and thus must be able to satisfy the essential duties of a police officer, regardless of the actual position they may hold at any given time.
>
> * * *
>
> The fact that Champ has fulfilled the light-duty assignments since his injury competently, fails to undermine the importance of requiring all officers to be able to perform the essential functions of their jobs. The mere existence of some non-patrol positions in which an officer would not generally be expected to make a forceful [sic] arrest as a part of his duties does not negate the conclusion that the essential functions of the job apply to all positions, thereby prohibiting Champ from being "otherwise qualified."

(884 F. Supp. at 998, 1000).

Again, this reasoning is in direct contradiction to the reasoning of the Second Circuit in this case, which overlooked the fact that a firefighter assigned to the Fire Prevention Bureau testified that he is expected to be able to fight fires and that he has been called to fire scenes in recent history. Mr. Stone's admitted inability to perform, with or without a reasonable accommodation, this unrefuted essential function prohibits him from being "otherwise qualified" under the ADA.

CONCLUSION

The ADA is a statute with far-reaching implications that the Second Circuit has taken to the most illogical extreme. The Second Circuit's holding that the frequency with which an emergency response duty is performed necessarily determines its "essential" nature is not only inherently illogical, it is also inconsistent with the holdings from the two other circuit courts of appeals discussed above. This case thus presents a question of exceptional importance not only to the law of disabilities discrimination, but also to public safety. Municipalities must retain the right to staff fire departments to handle even the most unlikely emergencies. The statute was not intended to cost citizens their lives — even one life in a rare emergency.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1158 August Term, 1996

(Argued: April 3, 1997 Decided: June 30, 1997)

Docket No. 96-7976

MATTHEW T. STONE,

Plaintiff-Appellant,

- v. -

CITY OF MOUNT VERNON and JAMES GLEASON, Individually and as Commissioner of the Fire Department of the City of Mount Vernon, New York,

Defendants-Appellees.

Before: OAKES, KEARSE, and ALTIMARI, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Brieant, *Judge,* summarily dismissing complaint alleging discrimination in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b.

Vacated and remanded.

DONALD L. SAPIR, White Plains, New York (William D.

Appendix A

DONALD L. SAPIR, White Plains, New York (William D. Frumkin, Louis G. Santangelo, Sapir & Frumkin, White Plains, New York, on the brief), *for Plaintiff-Appellant.*

TERENCE M. O'NEIL, Mineola, New York (Ernest R. Stolzer, Richard G. Kass, Jessica S. Weinstein, Rains & Pogebrin, Mineola, New York, on the brief), *for Defendants-Appellees.*

KEARSE, *Circuit Judge:*

Plaintiff Matthew T. Stone, a firefighter employed by defendant City of Mount Vernon (the "City"), appeals from a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge,* dismissing his complaint alleging that defendants City and Fire Commissioner James Gleason (collectively the "Fire Department" or "Department") violated his rights under, *inter alia,* the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (1994) ("Rehabilitation Act") (collectively the "federal disability statutes"), principally by refusing to assign him to a light-duty position after an off-duty accident that left him a paraplegic. The district court granted summary judgment dismissing the complaint on the ground that no rational trier of fact could conclude that Stone was able to perform the essential functions of the job of firefighter, and therefore he was not qualified within the meaning of the federal disability statutes. On appeal, Stone contends principally that summary judgment was improper because there were genuine issues of fact to be tried as to whether fire suppression is an essential function of a position in certain of the Department's specialized bureaus, and whether the Department could reasonably accommodate his

disability by assigning him to such a position. For the reasons that follow, we agree, and we therefore vacate the judgment of the district court and remand for further proceedings.

I. BACKGROUND

The events leading to this litigation are largely undisputed. The record, taken in the light most favorable to Stone as the party opposing summary judgment, with all permissible inferences drawn in his favor, reveals the following.

A. *The Events*

The City's Fire Department employs 109 firefighters. It has mutual-aid agreements with neighboring towns for assistance during multi-alarm fires. To the extent pertinent here, the Department has two "light-duty" bureaus: the Fire Alarm Bureau ("FAB") and the Fire Prevention Bureau ("FPB"). The duties of employees assigned to FAB include receiving and transmitting alarms of fires, answering telephones, and performing related paperwork; firefighters assigned to FAB assist non-firefighter dispatchers in dispatching firefighters to calls for service. The principal duties of employees assigned to FPB are enforcing the New York State Uniform Fire Prevention and Building Code and the Department's Fire Prevention Code, reviewing architectural plans and designs, meeting with builders, and performing inspections of buildings. Firefighters assigned to FPB may also be called upon to serve as guides to assist mutual-aid fire companies by meeting them at the City's border and leading them to the site of the fire; the guide travels either in the visiting fire rig or in a separate car.

Stone was hired by the Department in January 1990 and

entered service as an active firefighter; he was assigned to fire-suppression duties, which principally include extinguishing fires, entering burning buildings, and performing rescues. In December 1992, while off-duty, he was helping friends to remove from a house a tree that had been uprooted by a storm; the tree suddenly sprang upright, throwing Stone to the ground. He sustained injuries inducing paraplegia, and was initially paralyzed from the waist down. After undergoing physical rehabilitation, Stone is able, with the assistance of leg braces, to walk for a few hours at a time. He also uses a wheelchair, in which he can negotiate curbs and ramps; and he has a car that is outfitted with special hand controls that enable him to drive. Stone can get into and out of his car and his wheelchair without assistance. He is also able to climb and descend stairs out of his wheelchair while pulling the chair along with him.

Since his accident, Stone has remained an employee of the Department, on leave of absence with pay, thanks to contributions of accrued paid leave by his fellow firefighters. During this time, he has served as an instructor at the Westchester County Career Chiefs' Fire Academy, where he teaches fire-and-rescue-related courses to probationary firefighters from Westchester County. As an adjunct instructor at the New York State Fire Academy, he has taught a similar course to probationary firefighters from around New York State.

In November 1994, Stone, who passed an examination qualifying him for promotion to lieutenant, requested that he be returned to active duty and assigned a position in which his disability could be accommodated. His request identified FAB as one possible assignment. Stone received no response to his request. After attempting unsuccessfully to get a response, he wrote to Commissioner Gleason in January 1995, renewing his

requests. In May 1995, Stone was informed that he would not be accommodated and that he could not return to work.

B. *The Present Litigation*

Stone commenced the present action in October 1995, alleging principally that defendants' refusal to accommodate his disability by giving him a light-duty assignment, such as to FAB, violated his rights under the federal disability statutes. The complaint alleged that a February 1994 Department order stated (a) that Department members who were hired after July 1993 or who were injured in the line of duty and assigned to light duty were to be assigned to FAB as needed, and (b) that other Department firefighters not within those categories could request assignment to FAB; such requests would be granted at the discretion of the commissioner. The complaint alleged that Stone was qualified to perform the essential functions of a position in FAB and other light-duty positions.

Following a period of discovery, defendants moved for summary judgment dismissing the complaint. Relying principally on affidavits of Commissioner Gleason, defendants argued that all of the Department's active firefighters, regardless of the bureau to which they are assigned, must be available and ready to perform fire-suppression duties. According to Gleason, the Department's 109-firefighter staff was "thinly spread"; there was "no possibility of increasing the firefighting force beyond 109, because of budget constraints"; in Gleason's "opinion, the Mount Vernon Fire Department would not be able to provide satisfactory public safety services if it did not have the flexibility to assign Fire Prevention Bureau firefighters to firefighting duties when necessary"; and "a reduction of the number of firefighters available to fight fires would be unnecessarily dangerous."

(Affidavit of James D. Gleason, dated June 7, 1996, ¶ 20.) Further, according to Gleason, it was the Department's practice to assign only two categories of firefighter to FAB: (a) those who were unable to perform regular duties because of an on-duty injury and were statutorily entitled to receive full salary indefinitely, and who would therefore otherwise collect a salary without working, and (b) those who had suffered disabling off-duty injuries that were temporary. (*Id.* ¶ 11.) Stone, with a permanent injury suffered while he was off duty, did not fit into either category. Firefighters assigned to FPB included both those who had been injured on the job and those who were not injured but could fulfill the bureau's personnel needs. (*Id.* ¶ 17.)

Gleason acknowledged that at or after the end of 1994, two vacancies had occurred in FPB. He testified that he did not consider Stone for assignment on either occasion because the Department's policy was to assign to that bureau "a full-time firefighter"; he stated, "It doesn't come across my mind to put Mr. Stone in there because he's not at this time capable of doing fire duties." (Deposition of James D. Gleason, April 12, 1996, at 128.)

In opposition to defendants' summary judgment motion, Stone argued principally that fire suppression is not an essential function of a position in FAB or FPB and that the Department could reasonably accommodate his disability by assigning him to either of those bureaus. He submitted an affidavit describing his physical abilities and the responsibilities of firefighters assigned to those bureaus and stating his view that he could perform those assignments. He stated that defendants had never conducted or requested an examination of him to determine his physical capabilities, mobility, or ability to perform in FAB or FPB. (Affidavit of Matthew T. Stone dated June 26, 1996, ¶ 12.)

Appendix A

In support of his contention that fire suppression is not an essential function of a FPB position, Stone cited the deposition testimony of former FPB members John Koch and Nicholas Ionta. Koch, who entered service as a firefighter in 1972, was first assigned to FPB temporarily after hurting his back while on duty. He was reassigned to active duty after his injury healed, but thereafter, in or around 1985, he was assigned to FPB permanently and continued to serve in FPB at the time of his 1996 deposition. Koch testified that during all his years in FPB, he once, while a guide, operated a firehose at a major fire, without being asked to do so; while assigned to FPB, he never operated a pumping engine at a fire, never performed salvage operation at a fire, never rescued anyone from a burning building; he was never called to engage in fire-suppression activities.

Ionta entered service as a firefighter in 1959 and was transferred into FPB in the early 1970s following an automobile accident that occurred after he inexplicably passed out while driving. He remained assigned to FPB until he retired at the end of 1994. Ionta testified that during his more than 20 years in FPB, he served as a guide for mutual-aid fire companies, but he never was called upon to fight a fire.

Stone also cited the deposition testimony of the Department's Chief of Operations Henry Campbell, who viewed Stone as well qualified for assignment to FAB but who, with the agreement of the commissioner, had decided not to assign Stone to that bureau. Campbell expressed concern that such an assignment might in the future require the Department either to hire persons who were not as well qualified as Stone or to overload those bureaus with disabled individuals. Campbell testified as follows:

> I don't think there's a finer young person I ever met than Matt [Stone] and I think he would be an asset up there. I just envisioned what happens or what would happen down the road. Would we be forced to put everybody that got hurt there? Would it open the door for individuals who may already have some sort of a physical — a physical handicap who are not capable of meeting this standard . . . , but then would that allow them, now that I took care or assigned Matt to the Fire Alarm Bureau as a dispatcher, would that allow somebody to show up and say that I want to take this exam and I want that same kind of job? Those were the things that compounded our . . . reasoning . . . .
>
> . . . .
>
> [W]e can't accommodate ten people or five people, and that's what the difficulty is. That's really what it comes down to.
>
> *Can we accommodate Matt Stone up there? I certainly can. I certainly can.* [sic] *And do we need him up there? Yeah, we need him.*

(Deposition of Henry Campbell, April 9, 1996 ("Campbell Dep."), at 128, 143 (emphasis added).)

In a decision announced from the bench on July 12, 1996, the district court granted defendants' motion for summary judgment. The court stated that it "recognize[d] that a determination of essential job functions is a factual one," but it concluded that the record before it "demonstrate[d] that no

rational fact-finder could conclude that Mr. Stone is capable of performing the essential functions of the job of firefighter in Mount Vernon." (Transcript, July 12, 1996 ("Tr."), at 15.) Although the court "conclude[d] that [Stone] is capable of performing most, if not all, of the tasks required of firefighters assigned either to the FPB [or] FAB with reasonable accommodation and therefore would be qualified for such an assignment" (*id.* at 13), the court agreed with defendants "that climbing ladders and entering burning buildings and performing salvage operations at fires are functions which are at the core of a firefighter's training, and that these responsibilities are inherent in any description of a firefighter's job, and to remove them would be to redefine the nature of the job" (*id.* at 12 (internal quotation marks omitted)). The court "assume[d] that there may be several firefighters assigned to the FPB who have never been called upon to fight a fire" (*id.* at 13), and it found that "certain individuals assigned to [FPB and FAB] find most of their time committed to other tasks, such as inspections and alarm tracking" (*id.* at 16), but the court emphasized that "they were hired for their firefighting capabilities and as firefighters" (*id.*). Pointing to the Gleason affidavit, the district court concluded that "[t]he fluctuating demands of the Fire Department suggest that firefighting capabilities are essential in the event there should be a major fire, or riot, or natural disaster, or some other situation which required every person in the Fire Department to respond" (*id.* at 17), and that "the emergency nature of the Fire Department's responsibilities requires that all these persons temporarily or permanently assigned to [FPB or FAB] be able to undertake firefighting, when and if it becomes necessary" (*id.* at 17-18). The court thus concluded that Stone "ha[d] not shown to the satisfaction of this Court for purposes of this statute that he is capable of performing the essential functions of a firefighter." (*Id.* at 19-20.)

Judgment was entered dismissing the complaint in its entirety, including a state law claim that was dismissed without prejudice. This appeal followed.

II. DISCUSSION

A. *The Federal Disability Statutes*

The regulatory schemes of the ADA and the Rehabilitation Act are similar. The ADA prohibits covered employers from discriminating against an otherwise qualified employee "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The statute defines "qualified individual with a disability" to mean "an individual with a disability who, *with or without reasonable accommodation,* can perform the *essential functions* of the employment position that such individual holds or desires." *Id.* § 12111(8) (emphases added). The ADA defines the term "discriminate" to include

> not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . [the employer] can demonstrate that the accommodation would impose an *undue hardship* on the operation of the . . . [employer's] business.

42 U.S.C. § 12112(b)(5)(A) (emphases added).

The Rehabilitation Act prohibits disability-based

discrimination by government agencies and other recipients of federal funds. Section 504(a) of that Act provides that

> [n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a). Regulations promulgated by the Department of Health and Human Services under this statute define a "qualified" person with a disability as one "who, *with reasonable accommodation,* can perform the *essential functions* of the job in question." 45 C.F.R. § 84.3(k)(1) (1996) (emphases added). These regulations require recipients of federal funds to "make *reasonable accommodation* to the known physical or mental limitations of an otherwise qualified handicapped . . . employee unless the recipient can demonstrate that the accommodation would impose an *undue hardship* on the operation of its program," *id.* § 84.12(a) (emphases added). *See also Gilbert v. Frank,* 949 F.2d 637, 642 (2d Cir. 1991).

The terms common to both regulatory schemes are to be interpreted in the same way. *See, e.g.,* 42 U.S.C. § 12117(b) (federal agencies administering federal disability statutes are to avoid subjecting employment discrimination claims to "inconsistent or conflicting standards"); 29 U.S.C. § 794(d) (Rehabilitation Act is to be interpreted in accordance with the standards applied under the ADA); *Lyons v. Legal Aid Society,* 68 F.3d 1512, 1515 (2d Cir. 1995); *Staron v. McDonald's Corp.,* 51 F.3d 353, 355-56 (2d Cir. 1995). Thus, a plaintiff can establish a *prima facie* case under either statute by showing (1) that he is

an individual who has a disability within the meaning of the statute, (2) that an employer covered by the statute had notice of his disability, (3) that with reasonable accommodation, he could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations. *See, e.g., Lyons v. Legal Aid Society,* 68 F.3d at 1515. The employer can defeat the claim if it shows (a) that making a reasonable accommodation would cause it hardship, and (b) that the hardship would be undue. The burden of proof on these two issues is on the employer. *See, e.g., Borkowski v. Valley Central School District,* 63 F.3d 131, 138 (2d Cir. 1995) ("*Borkowski*").

In the present case, the questions center on the meanings of "essential [job] functions," "reasonable accommodation," and "undue hardship."

1. *"Essential Functions"*

The term "essential functions," which is not defined in the statutes themselves, is generally defined in ADA regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") to mean the "fundamental" duties to be performed in the position in question, but not functions that are merely "marginal," 29 C.F.R. § 1630.2(n)(1) (1996). The regulations also provide illustrations of the reasons that a given function may be found to be fundamental to the position and examples of evidence that may be considered in making that finding:

> *Essential functions* — (1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a

disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n). Plainly, the considerations set out in this regulation are fact-intensive. Usually no one listed factor will be dispositive, and the regulations themselves state that the evidentiary examples provided are not meant to be exhaustive.

2. *"Reasonable Accommodation"*

With respect to the term "reasonable accommodation," the ADA sets out a nonexclusive list of different methods of accommodation encompassed by the term "reasonable accommodation," stating that

> [t]he term "reasonable accommodation" *may include* —
>
> . . . .
>
> (B) *job restructuring*, part-time or modified work schedules, *reassignment to a vacant position*, . . . and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (emphases added). The ADA regulations state that the employer is required to provide

> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications that enable a[n] . . . employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(ii) and (iii). This description too is nonexclusive; the EEOC notes that "[t]here are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned" in § 1630.2(o). *EEOC, Interpretive Guidance on Title I of the Americans with Disabilities Act,* 29 C.F.R. pt. 1630, app. at 344 (1996). An accommodation is "reasonable," however, "only if its costs are not clearly disproportionate to the benefits that it will produce." *Borkowski,* 63 F.3d at 138.

As to the requirement that the requested accommodation be reasonable, "we have held that the plaintiff bears only a burden of production." *Id.*; *see Gilbert v. Frank,* 949 F.2d at 642. This burden "is not a heavy one. . . . It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Borkowski,* 63 F.3d at 138. Having accomplished this, a plaintiff will have made a *prima facie* showing that a reasonable

accommodation is available and the burden of nonpersuasion will shift to the defendant. *See id.; Gilbert v. Frank*, 949 F.2d at 642. The defendant must then show that the accommodation is not reasonable, or that it imposes an undue hardship, which "in practice . . . amount to the same thing." *Borkowski*, 63 F.3d at 138 (collecting cases).

3. *"Undue Hardship"*

In providing that discrimination includes an employer's failure to make a reasonable accommodation "unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer]," 42 U.S.C. § 12112(b)(5)(A), the ADA defines "undue hardship" as follows:

> **(A) In general**
>
> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> **(B) Factors to be considered**
>
> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include —
>
> (i) the nature and cost of the accommodation needed under this chapter;
>
> (ii) the overall financial resources of the

> facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10).

We have noted that " 'undue' hardship, like 'reasonable' accommodation, is a relational term; as such, it looks not merely to the costs that the employer is asked to assume, but also the benefits to others that will result." *Borkowski,* 63 F.3d at 139; *see also* 42 U.S.C. § 12101(a)(9) (purposes of ADA include providing individuals with disabilities an equal opportunity to pursue employment opportunities and reducing societal cost of dependency and nonproductivity).

> The burden on the employer, then, is to perform a cost/benefit analysis. In a sense, of course, that is what the plaintiff also had to do to meet her burden of making out a *prima facie* case that a reasonable accommodation existed. But while the plaintiff could meet her burden of production by identifying an accommodation that facially achieves a rough proportionality between costs and benefits, an employer seeking to meet its burden of persuasion on reasonable accommodation and undue hardship must undertake a more refined analysis. And it must analyze the hardship sought to be imposed through the lens of the factors listed in the regulations, which include consideration of the industry to which the employer belongs as well as the individual characteristics of the particular defendant-employer. If the employer can carry this burden, it will have shown both that the hardship caused by the proposed accommodation would be undue in light of the enumerated factors, and that the proposed accommodation is unreasonable and need not be made.

Borkowski, 63 F.3d at 139. However, we have "not at all intend[ed] to suggest that employers . . . must analyze the costs and benefits of proposed accommodations with mathematical precision." *Id.* at 140.

B. *Summary Judgment Principles*

We review a district court's grant of summary judgment *de novo*. *See, e.g., Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994). A motion for

summary judgment may not be granted unless the court has determined that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. *See* Fed. R. Civ. P. 56(c). The burden of showing the absence of any genuine dispute as to a material fact rests on the party seeking summary judgment. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989).

C. *The Record in the Present Case*

In the present case, we have several difficulties with the granting of summary judgment in light of the above regulations and the record created thus far. First, in ruling that Stone was incapable of performing the essential functions of the position he sought, the district court gave undue weight to the title "firefighter," emphasizing that firefighters who had been assigned to FAB and FPB "were hired for their firefighting capabilities and as firefighters" (Tr. at 16). We in no way suggest that the essential duties of a firefighter do not normally include fighting fires. However, proper analysis of a claim under the federal disability statutes, must be focused on "the fundamental job duties *of the employment position the individual with a disability . . . desires*," 29 C.F.R. § 1630.2(n)(1) (emphasis added), rather than solely on the title held by a person occupying that position or the other positions occupied by most persons holding that title. The court should have focused more closely on the job duties of firefighters assigned to FAB or FPB.

Second, the district court appears to have relied exclusively on the commissioner's opinion that the Department's capacity to fight multi-alarm fires would be unduly hampered by having assigned to FAB or FPB a firefighter who could not engage in fire-suppression activity. While plainly the "employer's judgment as to which functions are essential," 29 C.F.R. § 1630.2(n)(3)(i), is highly relevant evidence, it is only one of the regulations' seven illustrative categories of evidence, and it is the only category in the present case to suggest that the ability to extinguish fires, enter burning buildings, and perform rescues is an essential function of a firefighter assigned to FAB or FPB. So far as this record shows, for example, there are no job descriptions and no collective bargaining agreement provisions with respect to those bureaus that require fire-suppression activities. And although the court credited Gleason's opinion that in the event of a major fire the Department needed to be able to call upon "every person in the Fire Department to respond" (Tr. at 17), the present record indicates that, as a matter of practice, firefighters assigned to FAB or FPB simply have not been called upon to fight fires. Whenever the Department's own on-duty force has appeared to be insufficient to suppress a fire, the Department's standard practice has been to call in mutual-aid fire companies from neighboring towns, not to request that FAB or FPB members suit up to suppress the fire. (Indeed, the record indicates that the Department calls in mutual-aid fire companies in preference even to summoning off-duty members of its own force unless they have volunteered for overtime work.) Koch and Ionta, for example, with a total of 30 years' service in FPB between them, were never once called upon for fire-suppression activities. And we have seen in the record no evidence that any other person assigned to FPB or FAB was ever called on for fire-suppression activities. Plainly, therefore, it cannot be said that the reason the FAB and FPB

positions exist is to perform the fire-suppression function, or that the incumbents are assigned to those positions because of their ability to perform a fire-suppression function.

A function is, by definition, not "essential" to a position if that function is "marginal," and the evidence that neither the past nor the incumbent firefighters assigned to those bureaus have ever been requested to engage in a fire-suppression activity suggests that it would be entirely permissible for a factfinder to infer that the ability to engage in fire-suppression activities is marginal to the positions in FAB and FPB.

Nor do we see in the present record any basis on which it could be held as a matter of law that assignment of Stone to FAB or FPB would be an accommodation that was not "reasonable." The record indicates that in 1992-1996 some 15-20 firefighters were assigned to one of these bureaus following injuries. Though most of these assignments apparently were temporary, plainly the 10- and 20-year assignments of Koch and Ionta, respectively, suggest that career placement in those bureaus is not unprecedented.

Further, in order to establish *prima facie* that the accommodation requested was reasonable, Stone need show only that the cost of assigning him to one of those bureaus would not clearly exceed its benefits. The present record plainly would support a finding that the assignment would benefit Stone; and the testimony of operations chief Campbell clearly indicated that Stone's productivity in such a position would benefit not only society, but the Department itself as well:

> I don't think there's a finer young person I ever met than Matt [Stone] and I think he would be an asset up there. . . .

. . . .

> Can we accommodate Matt Stone up there? I certainly can. I certainly can. [*sic*] And do we need him up there? Yeah, we need him.

(Campbell Dep. at 128, 143.)

As for the cost of such an assignment, there apparently would be little or no monetary cost, since the commissioner has stated that the Department's budget constraints would foreclose the hiring of a 110th firefighter. The "cost" pointed to by the Department is the loss of its ability to call upon one member of FAB or FPB to engage in fire-suppression activity. This of course expresses an important concern in a matter of public safety. But in light of the present record suggesting that such a call has never been made on anyone assigned to that bureau in the past, the inability to call upon Stone in the future is a highly speculative loss of resource that cannot be said to exceed, as a matter of law, the concrete benefits of the assignment.

In sum, while it surely is not unreasonable for the Department to distinguish between temporary and permanent assignments, the present record equally surely does not permit the conclusion that making a permanent assignment to Stone would be an accommodation that was unreasonable as a matter of law. We conclude that the evidence of record sufficed to show that Stone presented a *prima facie* case under the federal disability statutes.

Finally, we note that notwithstanding the commissioner's opinion that the Department needed to have FAB and FPB firefighters available to carry out fire-suppression duties, the

present record does not come close to meeting the Department's burden of showing that making the accommodation of assigning Stone to one of those bureaus would be a hardship on the Department that would be "undue." The concern expressed by Campbell that operations would be hampered if the Department were forced to hire disabled persons not as well qualified as Stone or were forced to hire 5-10 disabled persons is not material to the present case. Each request for a reasonable accommodation under the federal disability statutes must be decided on the basis of the existing circumstances. To the extent that an employer has needs for a number of persons who have no disability, the number of employees already on staff who had disabilities would be a material factor to be considered. The suggestion that hiring 5-10 disabled persons would be an undue hardship is not a defense when the employer has hired none.

CONCLUSION

In sum, on the basis of the present record, a reasonable factfinder could infer that, for a Department that (a) has periodically assigned disabled employees to FAB or FPB, and (b), so far as the record shows, has never once asked any employee, of either of those bureaus, whether disabled or not, and whether assigned temporarily or permanently, to engage in fire-suppression activity, the assignment to either bureau of a single disabled employee whose only limitation is that he cannot engage in fire-suppression activity is neither an accommodation that would be unreasonable nor a hardship that would be undue. We therefore vacate the judgment dismissing the complaint and remand for further proceedings not inconsistent with this opinion. We do not view our decision on this appeal as precluding a judgment as a matter of law upon further development of the record.

The district court also dismissed Stone's state-law claim, declining to exercise supplemental jurisdiction over it because of the dismissal of the federal claims. In light of our reinstatement of the federal claims, we also vacate the dismissal of the state-law claim.

Costs to plaintiff.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 CIV. 9007 (CLB)

MATTHEW T. STONE

Plaintiff

- against -

CITY OF MOUNT VERNON, NEW YORK, JAMES GLEASON AS COMMISSIONER OF THE FIRE DEPARTMENT OF TAN CITY OF MOUNT VERNON, AND JAMES GLEASON INDIVIDUALLY

Defendants

U.S. Courthouse
White Plains, N.Y.
July 12, 1996
10:15 a.m.

Before: HON. CHARLES L. BRIEANT
U.S. District Judge

APPEARANCES:

For the Plaintiff: WILLIAM FRUMKIN, ESQ.
LOUIS SANTANGELO, ESQ.

For the Defendants: TERRY O'NEIL, ESQ.
ERNIE STOLZER, ESQ.

Appendix B

Court Reporter
Sue Ghorayeb, R.P.R., C.S.R.

[2] THE CLERK: Matthew Stone v. the City of Mount Vernon, et al..

THE COURT: Well, I was hoping that you reached some kind of accommodation in this matter, I gather you can't, so who wishes to be heard in support of the motion?

MR. O'NEIL: Your Honor, my name is Terry O'Neil. I represent the City of Mount Vernon.

Your Honor, the issue in this case involves whether Mr. Stone is a qualified individual with a disability; I think that issue arises whether you address this case under the A.D.A., the Rehab Act, or the State Human Rights Law; and whether or not he is qualified revolves around whether he can perform the essential functions of the job.

There are no issues here about accommodation, at least in our view, your Honor. I think that our position is that no matter what accommodation is provided to Mr. Stone, he cannot perform the essential functions of the job. And I think to approach this and examine what we are talking about, I think you have to look at what job he is seeking.

It's our position that he is seeking to be a firefighter. Not a firefighter assigned to fire prevention, not a firefighter assigned to dispatching, [3] but the position that is in issue here is the position of firefighter. And when you determine that that's the position and you look at what those essential functions are, obviously, one of the first places to look would be the job

description. I think it's unrefutable that when you look at the job descriptions —

THE COURT: Well, there is no doubt — as I understand it, he cannot perform the ordinary functions of a firefighter, but apparently there are firefighters who are desk bound all the time. He can perform the functions of a desk bound firefighter.

MR. O'NEIL: Your Honor, those are not the facts. The undisputed facts in this case are that in the City of Mount Vernon there are no permanent assignments that don't involve fire suppression.

There are individuals who are injured off the job who are temporarily accommodated, three months, four months. The record indicates the firefighters who are injured on the job, they are provided with light duty assignments, because in the State of New York we are required under Section 207 of the General Municipal Law to continue them at their full pay if they are injured on the job.

Now, that again —

THE COURT: So if you didn't provide light duty [4] assignments, they just sit home and get their money?

MR. O'NEIL: That's correct. They would get their money without doing anything.

THE COURT: Where you have such a situation, do you increase the personnel manning requirements of the department to take the place of the person that was injured on the job?

MR. O'NEIL: We either do that in some cities or in a place like the City of Mount Vernon we run short because of finances.

The important part about these 207 assignments, your Honor, is that they are also temporary. They only exist while that firefighter is injured and cannot perform the job, or until he is retired under the law.

And we have one situation in our city where we have someone, because of the distinctions between the retirement system and 207, we have one individual who we found to be injured on the job, it was a heart attack, the city made a determination it was on the job. When he went to the retirement system to be retired, there was a finding there that it was not job related. Now, that one anomaly certainly doesn't change the essential functions of the job, because right now he is on 207. We have to pay him anyway, because we have made the determination that it was job related, and because we [5] would do that with one individual and that's going on, we submit that is not permanent either.

THE COURT: I think I understand your contentions. Perhaps I can hear your adversary.

MR. FRUMKIN: Thank you, your Honor. My name is William Frumkin.

Your Honor, the Second Circuit in the Borkowski case, which I know the Court is familiar with, states that it's material — there is a fact question with respect to the issue of essential functions of the job. The Court stated that determination requires that not be made intuitively but fact specific inquiry from both the employer description of the job and how the job is actually performed in practice.

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THE COURT: You have no dispute with your adversary about the fact that your client cannot perform the typical work of a firefighter in suppressing fires?

MR. FRUMKIN: That's correct, your Honor.

THE COURT: That's the issue on which this motion is founded.

MR. FRUMKIN: But, your Honor, the way that spring is misplaced is because my client has asked for reasonable accommodation. which is reassignment of another position.

THE COURT: The only accommodation they can [6] give him would allow him to perform the function of a firefighter in suppressing fires.

MR. FRUMKIN: Your Honor, the record is clear that in the collective 40-year experience of the individuals in the Fire Prevention Bureau as fire inspectors, none of them have fought fires, none of them have provided fire suppression responsibilities.

Your Honor, there were two instances where individuals went to the fire scene because they were guides. Your Honor, guides means that there is a multi-alarm fire, and other fire districts around they have to go to the fire scene; that those individuals, you know, go out to those other districts and lead them to the fire because that is their knowledge. They are familiar with the area. So with respect to that issue, your Honor, none of those individuals have actually gone in and fought the flames. That is clear in the record.

Moreover, your Honor, one of those individuals testified that 65 percent of his job is fire inspection and 35 percent of the job is paperwork. The police commissioner himself has admitted that the fire guide duty, which I discussed earlier, does not include fighting fires.

The Second Circuit has clearly stated you have to look at the way the job is actually performed to [7] determine whether it's essential. You can't make a conclusory allegation, your Honor, that you have to fight fires when nobody ever does and hasn't done it in 40 collective years of experience.

Moreover, your Honor, I just want to make one other point, if I may, which is that the individuals that are in fire inspection have for the most part been able-bodied, and those able-bodied individuals have not fought fires.

A similar situation was recognized by Judge Kaplan in a case called Abady —

THE COURT: All he says is it's a triable issue of fact.

MR. FRUMKIN: Correct.

THE COURT: The Santos case is almost directly on point, Judge Martin's opinion.

MR. FRUMKIN: Judge Martin's opinion precedes the Borkowski opinion in the Second Circuit. In addition to which, in the Santos opinion there were no permanent light duty reassignment. There was in this particular case because of the assignment of Firefighter Satriale, which Mr. O'Neil alluded to.

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Moreover, your Honor, it's clear in Santos there was no testimony that these, I guess, corrections officers don't actually go out and have to do hands-on [8] work, you know, with respect to forcible arrest. It's totally different with respect to a firefighter who in their off duty — and they can decide to be off duty, not take a call. When they walk by a burning building, they are not required to jump in there.

So the Court is restrained by Borkowski to look at what the essential functions of the job on the record before the Court. Only thing here — we have here is the fire commissioner saying that they have to fight fires. When you actually look at the record, your Honor, there is nothing that supports that. It's conclusory.

In fact, your Honor, Chief Operations Officer Campbell has even stated, and it's in the brief on page 31, that Mr. Stone can be accommodated. So — okay. They need to accommodate him, but they are not going to because of the fear the precedent is going to set in other situations, which is in direction violation of the A.D.A., your Honor, because the A.D.A. requires they only look at the qualification of the individual in question and not based on anything happening in the future.

It's conceivable here that the record could be searched to find summary judgment for the plaintiff because there is no factual dispute that he is qualified [9] to perform the fire prevention or fire alarm duty positions based upon the admission of the chief officer Campbell.

The fact is that there is nothing but conclusory allegations in the record on behalf — which have been provided by defendants to say that fire suppression is an essential function of a firefighter's duties, either Fire Prevention or Fire Alarm Bureau.

THE COURT: All right. Thank you, sir.

MR. O'NEIL: Your Honor, can I be heard briefly on the issue of Fire Prevention Bureau and Borkowski?

THE COURT: Yes.

MR. O'NEIL: The record is clear that in the Fire Prevention Bureau, your Honor, there are affidavits from the chief of the department, as well as the commissioner, that the people assigned to Fire Prevention must be available for emergencies, and, in fact, contrary to what my adversary said, there is testimony by firefighter **Ionta, who was assigned to Fire Prevention, who said he went to a fire. He put on his gear, he went in and he fought the fire and he pulled people out. That's quoted in our reply brief.

The COURT: I think that your motion is directed to a pure issue of law and statutory construction as affected by the C.F.R. particularly. I [10] think it's also probably so that if they really want to accommodate him with a paper job, as they had under Section 207 for other people, they can do so. The question is, are they required by law to do so.

MR. O'NEIL: Your Honor, if they have not accommodated anybody else with that permanent —

THE COURT: I know that.

MR. O'NEIL: — assignment, we take the position as a matter of law they are not.

THE COURT: Well, the Court is considering C.F.R. 29

Section 1630.2 Subparagraph (n), and that's about all you have here going for you. I think the Court should resolve the matter at this time. The following constitutes the decision on the motion:

On October 20th, 1995, the plaintiff, Mr. Matthew T. Stone, who is a paraplegic, rendered so by an event which occurred not while he was engaged in the duties of his occupation as a firefighter of the City of Mount Vernon, brought this action against the City and Mr. James Gleason individually and as Commissioner of the City of Mount Vernon for violations of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12131-34, and Section 504 of the Federal Rehabilitation Act of 1973, as amended, found in 29 U.S.C. Section 794, and also Section 1983 of Title 42, [11] and he has also filed pendent state claims for violation of the New York State Human Rights Law, found in New York Executive Law Section 296.

Essentially, the plaintiff seeks damages and reinstatement as a firefighter of the City of Mount Vernon, and further requests that this Court enjoin the defendants from maintaining a practice of denying or abridging the rights of employees on the basis of disability and from retaliating against him for bringing this lawsuit. There is now before the Court the defendants' motion for summary judgment pursuant to Rule 56, essentially, as a matter of law.

The facts upon which the Court relies are not in dispute. The plaintiff was hired by the City of Mount Vernon as a firefighter on January 23rd, 1990. He served as an active firefighter until December 18th, 1992, when he became paralyzed from the waist down as a result of an off-duty accident. As a result of his paraplegia, Mr. Stone was unable to return to his previous duties.

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Unfortunately, Mr. Stone was not entitled to receive the benefits of New York General Municipal Law Section 207-a, hereinafter referred to as 207-a, simply because he was not injured in the line of duty, but the City did permit him to take sick leave and vacation [12] time. Thereafter, other firefighters donated leave time and work shifts for him, and he continued to receive his full benefits and salary until the present date, but the City threatens to terminate him and declines to continue him or to make any accommodation.

In November 1994, Mr. Stone requested "a reasonable accommodation to permit him to return to active duty, including but not limited to, a request for reassignment to the Fire Prevention Bureau or the Fire Alarm Bureau." However, this request was denied on May 31st, 1995, and Mr. Gleason explained and this Court finds that there are no permanent light duty positions within the City's Fire Department for firefighters who do not qualify under Section 207-a. Insofar as those who do qualify under 207-a; the City has the choice of sending them home with full salary or keeping them around the place at full salary. And because of the exigencies imposed by the legislature, the City must do that for persons injured in the line of duty who are firefighters, and that means they either have to provide for an additional member of the Fire Department, or if budgetary constraints prevent that, then the department works in short of full strength.

The motion is based on claims under the A.D.A. and Section 504 of the Rehabilitation Act. The Court is [13] not considering any of the pendent state claims, and Mr. Stone has withdrawn his Section 1983 claim and the claim against Mr. Gleason in his individual capacity, whatever that means.

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The defendants claim that Mr. Stone is unable to "fight a fire, a duty which is the most essential element of a firefighter's job." That's a quotation from the defendants' memorandum. Apparently, no one denies the truthfulness of that statement.

And the defendants contend that climbing ladders and entering burning buildings and performing salvage operations at fires are functions "which are at the core of a firefighter's training," and that these responsibilities are "inherent in any description of a firefighter's job, and to remove them would be to redefine the nature of the job." The Court agrees that is true as a matter of law.

The plaintiff argues that he is capable of performing the essential functions of a firefighter who happens to be assigned either to the Fire Prevention Bureau or the Fire Alarm Bureau. Plaintiff contends and the Court assumes for purposes of this motion that the persons assigned to the FPB and the FAB do not, as part of that assignment, engage in "fire suppression operations," but instead they work with paper shuffling [14] and visiting scenes, requiring fire fighting expertise but not actually involving a fire, including inspections of premises and so forth.

Plaintiff alleges and the Court assumes that there may be several firefighters assigned to the FPB who have never been called upon to fight a fire. Although, certain of them have acted as guides during fire emergencies, the vast majority of their time is spent at inspecting properties for fire hazards or shuffling paper.

The plaintiff also asserts that firefighters assigned to the FAB, who transmit and receive alarms of fires, answer phones, and fill out paperwork, do not engage in "fire suppression operations."

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The plaintiff contends and the Court concludes that he is capable of performing most, if not all, of the tasks required of firefighters assigned either to the FPB and FAB with reasonable accommodation and therefore would be qualified for such an assignment.

The defendants contend in opposition to this argument on the part of the plaintiff that the City of Mount Vernon's Fire Department consists of a total of 109 allocated firefighters, which include all the firefighters assigned to the department, including those working the FAB, the FPB, and any injured firefighters [15] in the line of duty who are assigned temporary or permanent light duty positions. Thus, the defendants contends and this Court concludes that the department's small size requires that all full-duty firefighters be capable of fighting fires, regardless of the bureau or task to which they may temporarily be assigned.

The Court points out that the job titles of the persons temporarily assigned to either of these bureaus are that of firefighter and not that of clerk or inspector or some other task.

The defendants argue and this Court agrees that a restriction on the City's ability to require every firefighter to respond to a fire, if required to do so, would necessarily have the result of reducing the strength of the Fire Department, as well as its efficiency, and would adversely affect the services provided to the public.

To prevail on the claim under the A.D.A. or the Rehabilitation Act, plaintiff must demonstrate: "First, that he has a disability; secondly, that he is qualified for the job; and third, that he was excluded from the job solely on the basis of his disability." Those words are quoted from the Borkowski case.

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An individual with a disability is qualified if he or she can perform the essential functions of the [16] employment position, with or without reasonable accommodation. That's Section 12111 Subparagraph (8) of Title 42.

Defendants do not dispute that Mr. Stone's paraplegia constitutes a disability, but they contend and the Court concludes that he cannot perform the essential functions of a firefighter in Mount Vernon, which includes fire suppression, and therefore he is not qualified for the position within the meaning of the statute.

The Court recognizes that a determination of essential job functions is a factual one, but the record before this Court demonstrates that no rational fact-finder could conclude that Mr. Stone is capable of performing the essential functions of the job of firefighter in Mount Vernon.

The Court finds persuasive in this case the reasoning set forth by Judge Martin in the case of *Santos v. Port Authority,* which can be found electronically as 1995 AL 431336 at page 2.

In determining which job functions are essential, consideration may be given to the employer's judgment, and "if the employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be [17] considered evidence of the essential functions of the job." That's a quotation from Santos.

Commissioner Gleason confirms that "the essential duties of a firefighter in the City of Mount Vernon include the climbing and descending ladders; entering burning buildings and walking

up and down stairs; evacuating people, and performing emergency first aid," as well as salvage after a fire has been extinguished.

These are the fundamental responsibilities of all full duty firefighters in the understaffed Mount Vernon Fire Department, regardless of the particular bureau to which they are assigned.

While it is true that certain individuals assigned to the two bureaus mentioned earlier find most of their time committed to other tasks, such as inspections and alarm tracking, they were hired for their firefighting capabilities and as firefighters.

This Court relies on 29 C.F.R. Section 1630.2 Subparagraph (n), which makes it clear that "a job function may be considered essential because of the limited number of employees available among whom the performance of that job function can be distributed, or because the function may be highly specialized so that the employee is hired for his or her expertise or [18] ability to perform the particular function."

Commissioner Gleason's affidavit states and the Court concludes that it is true that "Mr. Stone's injury prevents him from performing the essential duties of a firefighter assigned to any bureau within the Fire Department. The needs of the department and the nature of the firefighter's work require every firefighter in the City of Mount Vernon to be capable of performing firefighting duties at the scene of a fire." Affidavit of Gleason paragraph 22.

As I said earlier, the Court recognizes that firefighters assigned to the bureaus generally are not called upon to fight fires. The fluctuating demands of the Fire Department suggest

that firefighting capabilities are essential in the event there should be a major fire, or riot, or natural disaster, or some other situation which required every person in the Fire Department to respond. That's consistent with the conclusions expressed in the Santos case at page 2.

As I mentioned earlier, this Court takes into account the work experience of present and past assignees to these bureaus as contemplated by 29 C.F.R. 1630.2 Subparagraph (n), but agrees that the emergency nature of the Fire Department's responsibilities requires that all these persons temporarily or [19] permanently assigned to bureaus be able to undertake firefighting, when and if it becomes necessary.

Now, it is argued that persons who are qualified under Section 207-a, who are permitted to work in these bureaus, are for some reason evidence that this plaintiff can be permitted to be a firefighter with reasonable accommodation. The Court regards that as a flawed argument. Persons such as Mr. Satriale, who is mentioned in the papers, are entitled to their full pay and benefits regardless of what they do. That's a statute which was enacted for the benefit of firefighters and police officers injured in the line of duty. It's a gift from the legislature. It does not bear on the rights of the plaintiff.

As the Court observed earlier, when persons receive 207-a benefits, the employer might just as well have them at the place of business instead of sitting home and receiving their checks, and the work or the availability as firefighter must either be satisfied by running short of people or by increasing the number of employments.

And the reference to Firefighter McAvoy, who is assigned

to permanent light duty, is similarly distinguishable because he was injured in the line of duty and is entitled to benefits under Section 207-a.

[20] So the existence of the 207-a policy does not detract from the ultimate issue in this case as to whether all firefighters have to be able to fight fires as part of their job, which the Court concludes that they do. If the Court were to hold that a person incapable of fighting fires could carry out tasks specific to the FPB or FAB, then that position would not be distinguished from a host of other clerical and administrative positions.

This Court agrees with the holding in Santos that "while some positions may not require physical endurance, this is not an appropriate standard by which to judge whether these functions are essential. Firefighters are subject to transfer to an assignment that would require the performance of strenuous physical activities."

Every fire person is hired as a firefighter, and the fact that they also have other work does not detract from their obligation to perform the essential functions of a firefighter in this department of limited size, when and if there becomes a serious confrontation in the City.

Plaintiff, who alleges that he can only perform the specialized duties of persons assigned to the bureaus, has not shown to the satisfaction of this Court [21] for purposes of this statute that he is capable of performing the essential functions of a firefighter.

For the foregoing reasons, the defendants' motion for summary judgment on the A.D.A. and the Rehabilitation Act

claims is granted. The Court declines to exercise Supplemental jurisdiction over the state law claims, and those claims are dismissed without prejudice, and the clerk is ordered to file a judgment.

The foregoing constitutes the decision of the Court on the motion. It may be that the Court omitted some reference which counsel may consider of significance, and if I did so, I will hear from you at this time for any additional requests, beginning with you, Mr. O'Neil.

MR. O'NEIL: I think, your Honor, when you read the decision you made a reference to McAvoy. I think the record indicates that individual's name was McKoy.

THE COURT: McKoy. I beg your pardon, sir. The record will so indicate.

Mr. Frumkin.

MR. FRUMKIN: Your Honor, only thing I would like to add, your Honor, is the decision of Judge Kaplan in the Abady case.

THE COURT: All he says is it's a triable issue of fact.

[22] MR. FRUMKIN: Correct, your Honor.

THE COURT: I don't think I have stated any fact here which is in dispute. The conclusions of law may be a fair game for litigation, but I don't think there is any factual dispute here.

MR. FRUMKIN: Okay. Well, Just for a moment, if I may

be heard, the factual dispute is whether the individuals who are assigned to Fire Prevention and Fire Alarm Bureau actually fight fires.

THE COURT: They are called to fight fires. Wait until they have a good fire. I think it's clear enough.

MR. FRUMKIN: Your Honor, they have not over the last 40 years of their collective experience, but I understand the Court —

THE COURT: The Fire Department could be organized where they had bureaucrats at lower salaries doing this administrative work, but they have chosen to have this limited number of firefighters in the City and they aren't all on duty on the fire trucks every minute of the day. This is common sense really and I understand you don't agree with it.

Thank you all for your efforts here today.

MR. O'NEIL: Thank you, your Honor.

(Case concluded)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of October one thousand nine hundred and ninety-seven.

Dkt No: 96-7976

Matthrew T. Stone,

Plaintiff-Appellant,

v

City of Mount Vernon and James Gleason, Individually and as Commissioner of the Fire Department of the City of Mount Vernon, New York,

Defendant-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee's City of Mount Vernon, New York and James Gleason.

Appendix C

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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